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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. REGINALD LOUIS MORGAN, Defendant and Appellant.	B240863 (Los Angeles County Super. Ct. No. SA076055)

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert P. O'Neill, Judge. Affirmed.

Jeane Ballantine, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, James William Bilderback II and Alene M. Games, Deputy Attorneys General, for Plaintiff and Respondent.

Reginald Louis Morgan appeals from the judgment following his convictions for attempted voluntary manslaughter and other offenses against his wife, Tina P. We affirm.

FACTS AND PROCEEDINGS

Appellant Reginald Louis Morgan and Tina P. met in Las Vegas in November 2008. Three months later, they married on Valentine's Day 2009. Fueled by alcohol and illegal drugs, their marriage was tumultuous.

In the early evening of November 28, 2010, appellant and Tina were driving home on the freeway carrying packing supplies they had bought for moving out of their apartment. As Tina drove, appellant socked her several times in the face. When they arrived home, Tina hit appellant "upside his head" and told him she was ending their marriage. Tina spent the rest of the evening packing her belongings while drinking vodka and smoking marijuana laced with cocaine. At 3:00 a.m., appellant, who had been smoking marijuana, confronted Tina. He looked angry to Tina, "like Jack Nicholson in The Shining." He accused her of hurting him and his family financially by spending all his money. He told Tina that "before sunrise we will both be dead and [she] wasn't going to make it out there alive." Tina took appellant's threats seriously.

Appellant began moving toward the kitchen, where Tina believed he was going to get a knife to attack her. Running to the front door hoping to escape, Tina felt a sharp pain in her back. Appellant testified, "I walked in the kitchen, she jumped up and ran to the door. . . . I don't know how to explain it, but I got scared, so I grabbed the knives, and I walked to the door, by the time I got the door, she was opening the door, and I stabbed her in the back." Appellant continued to attack Tina outside in the apartment walkway, but Tina fought him off and escaped. Appellant then got in his car and drove to his sister's home. Appellant told his sister that he had stabbed Tina and asked his sister to call 911 to report the knifing.

The People charged appellant with corporal injury of a spouse, aggravated mayhem, and attempted willful, deliberate, and premeditated murder. Appellant pleaded

not guilty. The jury convicted appellant of corporal injury to a spouse. The jury acquitted appellant of aggravated mayhem, but convicted him of the lesser included offense of mayhem. The jury also acquitted appellant of attempted murder, but convicted him of the lesser included offense of attempted voluntary manslaughter. The jury found true that appellant used a deadly weapon against Tina and inflicted great bodily injury under circumstances involving domestic violence. The court sentenced appellant to 11 years and 6 months in state prison. This appeal followed.

DISCUSSION

1. Admission of Prior Uncharged Domestic Violence

The court permitted the prosecution to introduce evidence of multiple prior uncharged acts of domestic violence by appellant against Tina. Prior acts of domestic violence are admissible to show a defendant's propensity to commit a current offense involving domestic violence. Evidence Code section 1109 states: "in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 [generally barring propensity evidence] if the evidence is not inadmissible pursuant to Section 352." (§ 1109, subd. (a).)[1]

Appellant did not object to admission of evidence about a May 2009 act of domestic violence, the prior uncharged act for which the prosecution offered the most detailed testimony. One day in May 2009 appellant spent his day socializing with friends. When appellant arrived home, Tina angrily confronted him about his being gone all day. Instead of going to their bedroom where their dispute might escalate, appellant remained in the living room with other adult family members, but Tina "nudged" him several times to go to their bedroom where they could discuss their dispute in private. Prompted by the nudges, appellant went to the bedroom accompanied by his sister, Myrlyn. When appellant entered the bedroom, Tina started swinging and grabbing at

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[1] All further section references are to the Evidence Code.

him. Myrlyn grabbed Tina, pulled her to the floor, and sat on her. Myrlyn told Tina she would let Tina up when Tina calmed down. Myrlyn then released Tina, at which point Tina slammed appellant's head into their bed's headboard. Tina and appellant wrestled on the bed, during which appellant bit Tina on her cheek and torso. Appellant then left the house and Tina called 911. Police arrived and interviewed Tina. Before the police left, appellant returned to the house and the police arrested him. While booking appellant, an officer saw appellant had injuries which the officer believed were "defensive injuries" from Tina's having defended herself against appellant.

In addition to admission of the May 2009 domestic violence evidence to which appellant did not object, the court admitted over appellant's objection evidence of other acts of uncharged domestic violence. They were:

● Appellant poured vodka over Tina's head during their honeymoon and "almost bit" off her hand trying to pull her wedding ring from her finger.

● Appellant woke Tina up one night in October 2010 and told her he wanted to "party." Instead of joining him in partying, Tina went to the bathroom to dress for work. From the hallway outside the bathroom, appellant threw a glass into the bathtub, shattering the glass. Appellant then shoved Tina onto the glass in the tub and, grabbing her throat, threatened to "snap" her neck if she continued to yell. When she quieted, he released her.

● Appellant threatened Tina with a knife during arguments on "about three occasions."

Appellant notes that section 1109 requires the trial court to weigh the probative value of uncharged prior acts of domestic violence against their prejudicial effect under section 352. Appellant contends the trial court violated his right to due process by improperly weighing the evidence under section 352 to admit the uncharged acts of

domestic violence because they were not probative of a specific intent to kill. (*People v. Partida* (2005) 37 Cal.4th 428, 435 [misweighing of evidence under section 352 can support claim of due process violation]; *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1313-1314 [due process requires court to properly weigh prior domestic violence under sections 1109 and 352].) Appellant admits he stabbed Tina, but he denies having formed a specific intent to kill, which is an element of attempted murder and attempted voluntary manslaughter for which he was tried. (*People v. Smith* (2005) 37 Cal.4th 733, 739 [attempted murder requires specific intent]; *People v. Montes* (2003) 112 Cal.App.4th 1543, 1549-1550 [attempted voluntary manslaughter requires specific intent].) According to him, the uncharged acts of domestic violence to which he objected were either too vague or too dissimilar to his current alleged offenses against Tina to be probative of his intent. (Contrast *People v. Johnson* (2010) 185 Cal.App.4th 520, 531-531 [similarity of prior act and current offense supports probative value]; *People v. Morton* (2008) 159 Cal.App.4th 239, 242, 246-247 [same]; *People v. Harris* (1998) 60 Cal.App.4th 727, 740 [same].) He asserts none involved an attempt to kill, and two of them (the honeymoon and bathtub incidents) involved no deadly weapon at all. And although Tina testified there were "about three occasions" involving threats with a knife, she did not testify that he tried to follow through with those particular threats. The uncharged prior acts, appellant seems to imply, showed at most that he was a wife-beater, but not an attempted murderer. Because the key dispute at trial was not whether he had stabbed Tina but instead his intent, the prior uncharged acts served only to cast him in a bad light without illuminating whether he had formed a specific intent to kill. Moreover, appellant contends the prior uncharged acts were not corroborated, which further undermined their probative value.[2] (*People v. Rucker* (2005) 126 Cal.App.4th 1107, 1113 [independent corroboration supports probative value; lack of corroboration is factor that tends toward exclusion].)

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[2] Appellant testified the prior uncharged incidents were either mutual combat in which he was defending himself against attacks Tina initiated, or he did not hit Tina during them.

We review the trial court's admission of prior uncharged acts of domestic violence for abuse of discretion. (*People v. Johnson, supra,* 185 Cal.App.4th at p. 531; *People v. Jennings, supra,* 81 Cal.App.4th at pp. 1314-1315.) In enacting section 1109, the Legislature relied on links it found generally between domestic violence and other violent crimes against a spouse. The Legislature found, for example, that domestic violence often involves an abuser's desire to control the victim. The "legislative history of [section 1109] recognizes the special nature of domestic violence crime, as follows: 'The propensity inference is particularly appropriate in the area of domestic violence because on-going violence and abuse is the norm in domestic violence cases . . . [in which any one particular] battering episode is part of a larger scheme of dominance and control . . . .' " (*People v. Johnson* (2000) 77 Cal.App.4th 410, 419-420.) The Legislature also found that escalation in the severity of violence is a hallmark of domestic abuse. (*People v. Johnson, supra,* 185 Cal.App.4th at p. 532, fn 8.) Thus, appellant's prior acts of domestic violence tended to negate his claims of mutual combat and self-defense that hung over the trial. The prior acts also tended to negate his defense that he stabbed Tina impulsively in a moment of unthinking rage. "Section 1109 was intended to make admissible a prior incident 'similar in character to the charged domestic violence crime, and which was committed against the victim of the charged crime or another similarly situated person.' [Citation.] Thus, the statute reflects the legislative judgment that in domestic violence cases . . . similar prior offenses are 'uniquely probative' of guilt in a later accusation. [Citation.] Indeed, proponents of the bill that became section 1109 argued for admissibility of such evidence because of the 'typically repetitive nature' of domestic violence. [Citations.] This pattern suggests a psychological dynamic not necessarily involved in other types of crimes." (*Id.* at pp. 531-532, fn. omitted.) We find the court did not violate appellant's right to due process or abuse its discretion under sections 1109 and 352 in admitting evidence of the prior acts as probative of appellant's intent when he stabbed Tina.

Appellant contends the evidence of the uncharged prior acts consumed undue time at trial. The prototypical objection to the undue consumption of time arises when a

proponent of evidence objects to the court's exclusion of evidence on that ground. Appellant cites no authority involving examples of the prototype's reverse; in other words, examples where the court admitted evidence over the objector's claim that the evidence consumed undue time. (But see *People v. Frazier* (2001) 89 Cal.App.4th 30, 42 [noting "conceivably a case could arise in which the time consumed trying the uncharged offenses so dwarfed the trial on the current charge as to unfairly prejudice the defendant" but defendant did not do so where uncharged offenses consumed only a little more than one-quarter of trial time].) As a reviewing court, we are reluctant to second-guess a trial court's discretionary management of its calendar, time, and case load. Thus we discern no grounds for finding the court violated appellant's right to due process or abused its discretion by not, as appellant implies, "speeding things up" by excluding the evidence of uncharged prior acts of domestic violence.

2. CALJIC 2.50.02

The court instructed the jury with CALJIC 2.50.02. The instruction states: "Evidence has been introduced for the purpose of showing that the defendant engaged in an offense involving domestic violence on one or more occasions other than that charged in the case. [¶] . . . [¶] If you find that the defendant committed a prior offense involving domestic violence, you may, but are not required to, infer that the defendant had a disposition to commit other offense[s] involving domestic violence. If you find that the defendant had this disposition, you may, but are not required to, infer that [he] was likely to commit and did commit the crime or crimes of which [he] is accused. [¶] However, if you find by a preponderance of the evidence that the defendant committed a prior crime or crimes involving domestic violence, that is not sufficient by itself to prove beyond a reasonable doubt that [he] committed the charged offense[s]. If you determine an inference properly can be drawn from this evidence, this inference is simply one item for you to consider, along with all other evidence, in determining whether the defendant has been proved guilty beyond a reasonable doubt of the charged crimes. [¶] You must not consider this evidence for any other purpose."

Appellant notes that attempted murder and attempted voluntary manslaughter are specific intent crimes. (*People v. Smith, supra,* 37 Cal.4th at p. 739; *People v. Montes, supra,* 112 Cal.App.4th at pp. 1549-1550.) Appellant argues that CALJIC 2.50.02 permitted the jury to infer that he formed a specific intent to kill based on prior acts of domestic violence. Appellant correctly observes that a "permissive inference violates the Due Process Clause . . . if the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury." (*People v. Mendoza* (2000) 24 Cal.4th 130, 180.) He claims CALJIC 2.50.02 violated his right to due process because inferring a specific intent to kill from a history of domestic violence is unreasonable.

We begin by noting that appellant did not object to the court's instructing the jury with CALJIC 2.50.02, thus arguably waiving the point on appeal. But in any case, whether logic and common sense support a jury instruction's permissive inference is a question of law that we independently review. (*Kidron v. Movie Acquisition Corp.* (1995) 40 Cal.App.4th 1571, 1580; see also *People v. Posey* (2004) 32 Cal.4th 193, 218.) We see no illogic in inferring a specific intent to kill from a history of domestic violence. The evidence showed appellant repeatedly harbored ill will and criminal intent toward Tina and with those states of mind attacked her repeatedly during their marriage. The Legislature has found that such ill will can intensify during an abusive relationship, moving from beatings to killings. Domestic violence "usually escalates in frequency and severity. . . . If we fail to address the very essence of domestic violence, we will continue to see cases where perpetrators of this violence will beat their intimate partners, even kill them, and go on to beat or kill the next intimate partner." (*People v. Johnson, supra,* 77 Cal.App.4th at p. 419.)

People v. Pescador (2004) 119 Cal.App.4th 252 is instructive. There, the defendant asserted CALJIC 2.50.02 permitted the jury to rely on uncharged domestic violence by him against his wife to infer he was likely to have committed premeditated murder of his wife. (*Pescador,* at pp. 255, 258.) *Pescador* found nothing irrational about the inferences permitted by the instruction. *Pescador* held it was reasonable to infer from

a history of prior domestic violence a propensity to commit further domestic violence. (*Pescador*, at p. 259.) *Pescador* further held it was reasonable to infer that the prior commission of domestic violence, whether or not impulsive, suggested a propensity for committing domestic violence even if it involved premeditation, such as murder. (*Pescador*, at p. 260.)

Likewise here. CALJIC 2.50.02 permits the jury to infer from appellant's previous acts of domestic violence his commission of "other offenses involving domestic violence." The backdrop of an intimate relationship informs our analysis because it separates domestic violence from ordinary physical assault. One might believe, as appellant implies, that one cannot logically infer an intent to kill from a history of ordinary physical assaults that, say for example, one might find among neighborhood bullies or barroom brawlers. But the Legislature has rationally concluded that an intent to kill can be inferred from a history of domestic violence, a finding that underpins CALJIC 2.50.02.

Appellant also contends CALJIC 2.50.02 is argumentative. We disagree. An argumentative instruction *selects* specific disputed facts or evidence for highlighting and *directs* the jury to draw from those facts and evidence inferences favorable to one side. (*People v. Wright* (1988) 45 Cal.3d 1126, 1135.) CALJIC 2.50.02 does not direct the jury to infer from domestic violence an intent to kill. Instead, it instructs the jury that it may, but is not required to, draw from prior acts of domestic violence that appellant may have committed the current charged offense involving domestic violence. Furthermore, the instruction emphasizes that the jury must not convict appellant of the charged offense solely on the basis of the prior acts of domestic violence. (Compare *Wright*, at p. 1135, fn. 5 [argumentative instruction told jury that "in determining whether a reasonable doubt exists as to the guilt of [defendant] you may consider that: (1) All of the robbers wore masks . . . ." [and other selected pieces of evidence presumably deemed favorable by defendant].) Appellant's contention that the instruction is argumentative thus fails.

3. Prosecutor's Misstatement of Legal Element

During closing argument, the prosecutor misstated one element of attempted voluntary manslaughter as a lesser included offense of attempted murder. The prosecutor told the jury: "The two ways to get from an attempted murder to voluntary manslaughter, there are – you can either find he had *no intent* to kill due to acting in the imperfect self-defense, or that he had *no intent* to kill, because he was acting under the heat of passion. Either one of these routes will get you down to the lesser included crime."[3] Defense counsel did not object to the misstatement, arguably forfeiting the point on appeal. (*People v. Anzalone* (2006) 141 Cal.App.4th 380, 393.) But even if one assumes the point remains for appeal, the court properly instructed the jury in its written and oral instructions. Additionally, the court told the jury that the court's instructions, not counsel's arguments, stated the law the jury must follow. Accordingly, we find that the prosecutor's passing misstatement, which the prosecutor did not dwell upon or elaborate, did not constitute reversible error. (*People v. McDowell* (2012) 54 Cal.4th 395, 438; *People v. Seaton* (2001) 26 Cal.4th 598, 661.)

DISPOSITION

The judgment is affirmed.

RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J. GRIMES, J.

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[3] Our supposition is the prosecutor confused "intent to kill," which is an element of attempted voluntary manslaughter, with "malice aforethought," which is not. (CALJIC 8.50.)